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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 KET HAWKINS,

11 Petitioner, No. CIV S-01-1549 FCD JFM P

12 vs.

13 ERNIE ROE, Warden, et al.,

14 Respondents. FINDINGS AND RECOMMENDATIONS

15 _____ /
16 Petitioner is a former state prisoner proceeding pro se with an application for a
17 writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1999 conviction on
18 charges of kidnaping, felony false imprisonment, and misdemeanor assault. Petitioner raises
19 claims of prosecutorial misconduct and ineffective assistance of trial counsel. Upon careful
20 consideration of the record and the applicable law, the undersigned will recommend that
21 petitioner's application for habeas corpus relief be denied.

22 PROCEDURAL AND FACTUAL BACKGROUND¹

23 [Petitioner] was charged by an amended information with two
24 counts (count 1 and 2) of sexual battery (Pen. Code, § 243.4, subd.

25 ¹ The facts are taken from the opinion of the California Court of Appeal for the Third
26 Appellate District in People v. Hawkins, No. C032945 (January 3, 2001) (hereinafter Opinion), a
copy of which is attached as Exhibit B to Respondents' Answer, filed March 11, 2002.

(a))²; two counts of false imprisonment (§ 236), one of which occurred at his residence (count 3) and one of which occurred in his car (count 5); one count (count 4) of kidnapping (§ 207, subd. (a)); and one count (count 6) of assault with intent to rape (§ 220). The case proceeded to a jury trial, and was consolidated with a hearing on an alleged probation violation.³

At trial, the following evidence was adduced:

The victim had pulled into a gas station because of car trouble. The [petitioner] offered to have her car towed to one of his auto repair shops. The victim thereafter got into [petitioner]'s car, a Lexus, in part to get out of the heat and in part because she understood that [petitioner] would drive her to the repair shop.

On their way, [petitioner] and the victim stopped at an AM/PM store, where [petitioner] purchased alcoholic beverages for both of them. The victim picked out two bottles of St. Ides, and [petitioner] selected some wine coolers.

[Petitioner] then told the victim that he needed to take her to his house so that he could attend to a matter. Once there, [petitioner] showed the victim his swimming pool, but she declined his invitation to go swimming because she did not have a bathing suit. He next invited her to view the closet that he had built in his bedroom. Once she entered the bedroom, he asked her to pose on his bed for a photograph. She declined, became uncomfortable, went into the living room, and asked to leave.

Meanwhile, [petitioner] began to massage the victim's shoulders and back with baby oil. Becoming afraid, the victim told him to stop. [Petitioner] pulled down her bra strap; the victim tried to get up but slipped; then [petitioner] pinned her down on the couch and pulled her bra and her tank top down. As he touched and kissed one of her breasts, she thought he was going to rape her. She hit him, told him that he would not get away with it, and said that she had been raped before.

The victim then repeatedly tried to leave, but [petitioner] would not permit her, yanking her back into the house on one occasion. At one point, however, [petitioner] said that he wanted her to leave, grabbed her, and pushed her into the garage.

After they were in his car, [petitioner] "yelled" at her and said that she had two choices: he would drive her to the police or to the

² Unless designated otherwise, all further statutory references are to the Penal Code.

³ At the time of these offenses, [Petitioner] was on probation for spousal abuse (§ 273.5) in case no. 97F04857.

1 repair shop, whichever she preferred; she asked to go to the police.
2 Instead, he drove in a different direction. She tried to escape from
3 the moving car, but he kept locking it with his power door locks.
4 Finally, she succeeded in jumping out of the car, ran in front of a
5 passing van, and forced it to stop and pick her up. The van took
6 her to an AM/PM market where a group of California Highway
7 Patrol officers was gathered in the parking lot. She told the
8 officers what had happened to her.

9 Meanwhile, [petitioner] arrived at the same market. One of the
10 officers testified that [petitioner] related that “he had given a lady a
11 ride off the freeway, that he finally took the lady to his house and
12 they got into some kind of altercation and he wanted to . . . bring
13 her to us . . . because he had some other problems.”

14 [Petitioner] testified at trial that the victim had been receptive to
15 his advances until he informed her that the repair shop had
16 determined that her car was not worth fixing. At that point, he
claims, she became angry and accused him of trying to rape her.

17 Nonetheless, [petitioner] acknowledged a number of facts that
18 were consistent with the victim’s version: that he invited the victim
19 to swim in his pool and suggested that she swim in her “bra and
20 panties,” that she declined his offer to take her picture, that he
began to massage her shoulders (but he denies touching her breast
or holding her down), that her bra strap came down, that she
accused him of intending to rape her and stated that she had been
raped before ([petitioner] says that she told him that she had been
raped by three men), that the victim asked to go to the police
station (but changed her mind), and that the victim jumped out of
the car and flagged down another car.

21 The jury returned guilty verdicts for kidnapping (count 4), one
22 count of false imprisonment while the victim was in [petitioner]’s
car (count 5), and misdemeanor assault (§ 240) – the lesser
included offense of count 6.⁴ The jury also reported that it was
deadlocked on counts 1, 2, and 3 (two counts of sexual battery and
one count of false imprisonment at [petitioner]’s residence). As a
result, the court declared a mistrial as to counts 1, 2, and 3, which
were subsequently dismissed in the interest of justice.

23 [Petitioner] moved for a new trial on the grounds that the
24 prosecutor committed misconduct during [petitioner]’s cross-

25 ⁴ The record is in conflict as to whether the jury found [petitioner] guilty as to count 6.
26 The verdict form shows a not guilty verdict, but the court minutes reflect a guilty verdict.
[Petitioner]’s brief suggests that [petitioner] was found not guilty of count 6 and only guilty of
the lesser included offense of misdemeanor assault. But the People allege that [petitioner] was
found guilty of count 6, but was not sentenced on that count because of the guilty verdict on the
lesser included offense. Since the parties do not brief this issue, we do not consider it.

1 examination and during argument by citing to facts not in evidence.
2 The trial court found no prosecutorial misconduct and denied the
motion.

3 [Petitioner] then filed a motion for reconsideration. The court
4 denied that motion, although this time the court found that the
prosecutor had committed misconduct, but that it did not constitute
a “miscarriage of justice.”

5 [Petitioner] was sentenced to an aggregate term of five years in
6 prison, composed as follows: five years for the kidnapping
conviction; a two-year sentence for false imprisonment, which was
7 stayed pursuant to section 654; a sentence of time served for the
misdemeanor assault conviction; and a concurrent sentence of three
8 years for spousal abuse as a result of the probation violation.⁵

9 (People v. Hawkins, slip op. at 2-3.)

10 ANALYSIS

11 I. Standards for a Writ of Habeas Corpus

12 Federal habeas corpus relief is not available for any claim decided on the merits in
13 state court proceedings unless the state court's adjudication of the claim:

14 (1) resulted in a decision that was contrary to, or involved an
15 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable
17 determination of the facts in light of the evidence presented in the
State court proceeding.

18 28 U.S.C. § 2254(d).

19 Under section 2254(d)(1), a state court decision is “contrary to” clearly
20 established United States Supreme Court precedents “if it ‘applies a rule that contradicts the
21 governing law set forth in [Supreme Court] cases’, or if it ‘confronts a set of facts that are
22 materially indistinguishable from a decision’” of the Supreme Court and nevertheless arrives at
23 different result. Early v. Packer, 573 U.S. 3, 8 (2002) (quoting Williams v. Taylor, 529 U.S. 362,
24 405-406 (2000)).

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26 ⁵ The abstract of judgment erroneously records the concurrent sentence for the spousal
abuse conviction as a consecutive, but stayed, three-year sentence.

Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

II. Petitioner’s Claims

A. Prosecutorial Misconduct

Petitioner’s first claim for relief is that the prosecutor committed misconduct when he questioned appellant about a prior allegation of sexual misconduct involving petitioner’s former spouse and then commented on petitioner’s answers to those questions during closing argument. These claims were rejected by the California Court of Appeal on petitioner’s direct appeal of his conviction and summarily denied by the California Superior Court on petition for review. (Answer, Exs. B, E.) After setting forth the relevant legal standards, the court will analyze both claims of prosecutorial misconduct in turn below.

1. Legal Standards

Success on a claim of prosecutorial misconduct requires a showing that the conduct so infected the trial with unfairness as to make the resulting conviction a denial of due

process. Greer v. Miller, 483 U.S. 756, 765 (1987). The conduct must be examined to determine “whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury’s discharge of its duty to judge the evidence fairly.” United States v. Simtob, 901 F.2d 799, 806 (9th Cir. 1990). Generally, if an error of constitutional magnitude is found, a harmless error analysis ensues. Error is considered harmless if, after reviewing the entire trial record, the court decides that the alleged error did not have a “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). Error is deemed harmless unless it “is of such a character that its natural effect is to prejudice a litigant’s substantial rights.” Kotteakos v. United States, 328 U.S. 750, 760-761 (1946).

2. Questions on Cross-Examination

Petitioner’s first claim is that the prosecutor committed misconduct when he asked petitioner questions on cross-examination about “a prior allegation of digital penetration.” (Pet. at 5.) The Court of Appeal explained the background to this claim as follows:

Before trial, the court granted the prosecution’s motion in limine to allow the prosecution to introduce [petitioner]’s prior conviction for spousal abuse (§ 273.5) for purposes of impeachment and to introduce the underlying facts of the assault pursuant to Evidence Code section 1108.⁶ Although [petitioner] does not dispute the

⁶ Evidence Code section 1108 provides as follows:

“(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶]

“(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code. . . .”

1 court's ruling, he challenges the prosecution's inquiry during
2 [petitioner]'s cross-examination as to whether [petitioner] digitally
3 penetrated his former spouse during the course of the spousal abuse
4 because "the prosecutor could not have reasonably expected an
affirmative response to his question [concerning whether
[petitioner] put his fingers into his former wife's vagina]" and thus
committed prosecutorial misconduct.

5 "It is misconduct for a prosecutor to ask a witness a question that
implies a fact harmful to a defendant unless the prosecutor has
6 reasonable grounds to anticipate an answer confirming the implied
fact or is prepared to prove the fact by other means. [Citation.]"
7 (People v. Price (1991) 1 Cal.4th 324, 481; accord People v.
8 Warren (1988) 45 Cal.3d 471, 480.) However, "[i]n the absence of
prejudice to the fairness of a trial, prosecutor misconduct will not
trigger reversal." (People v. Bolton (1979) 23 Cal.3d 208, 214.)

9 The prosecution's challenged questioning of [petitioner] was as
10 follows:

11 "Q. You were convicted in 1998 of felony spousal abuse, correct?

12 "A. Correct.

13 "Q. As part of that case, you actually digitally penetrated and
14 sexually assaulted –

15 "MR. BROWN: Your Honor, may we approach, please?

16 "THE COURT: Yes.

17 (Discussion at bench)

18 "MR. BROWN: Thank you, your Honor.

19 THE COURT: Uh-huh.

20 "(By Mr. Sawtelle) Now, as part of that case –

21 "MR. SAWTELLE: I'll go ahead and ask the question again.

22 "Q. (By Mr. Sawtelle) – the victim was [your former spouse],
correct?

23 "A. Um, yes.

24 "Q. As part of that case, you went into her house – at your son's
house, correct, forced your way in through the door, you took her

1 into the back room, chased her in the back room, you ripped her
2 underwear off and you digitally penetrated her, correct?

3 “MR. BROWN: That’s not a question, your Honor.

4 “THE COURT: I’ll sustain it based on compound.

5 “Q. (By Mr. Sawtelle): Did you go to your wife’s, or at the time,
6 your ex-wife[‘s] . . . house, on May 1st, 1997?

7 “A. Did I go to her house?

8 “Q. Yes . . .

9 “Q. Did you force your way in through the door?

10 “A. No, I didn’t.

11 “Q. Did you push her to the ground?

12 “A. No, I didn’t.

13 “Q. Did you strike her?

14 “A. No, I didn’t.

15 “Q. Did you rip her underwear off?

16 “A. Not intentionally.

17 “Q. Did you rip her underwear off?

18 “A. No.

19 “Q. Did her underwear get removed –

20 “A. Yes.

21 “Q. – accidentally?

22 “A. No. We – she – yes . . .

23 “Q. Did you put your fingers into her vagina?

24 “A. No, I didn’t.

25 “She never –

26 “Q. Did you place your finger or your hands on her vagina?

“A. No, I didn’t.

1 “Q. Were you charged with sexual assault and digital penetration
2 on [your former spouse]?

3 “A. Yes, I was.”

4 (Opinion at 6-9.)

5 The California Court of Appeal found that the prosecutor had not committed
6 misconduct when he asked petitioner the questions set forth above because the trial court had
7 granted his motion in limine to inquire about the facts surrounding petitioner’s prior conviction
8 of spousal abuse, and had thereby given him permission to ask these questions. The court
9 concluded that “it is not prosecutorial misconduct to ask judicially authorized questions.” (Id. at
10 10.)⁷ Even assuming arguendo that the prosecutor’s questions were improper, the appellate court
11 found that petitioner did not suffer prejudice. The court reasoned as follows:

12 First, [petitioner] denied any digital penetration and there was no
13 evidence before the jury of such penetration. Second, [petitioner]
14 did admit the spousal abuse conviction, and the inquiry of digital
15 penetration would not appear to have influenced the jury separately
16 from knowledge of that conviction, particularly in light of the fact
17 that the jury deadlocked on the arguably similar sexual battery
18 counts and only found [petitioner] guilty of kidnapping, false
19 imprisonment of the victim in his car, and misdemeanor assault.
20 Third, on three occasions, the trial court admonished the jury that
21 counsel’s statements were not evidence, first after jury selection,
22 second during the court’s charge to the jury, and third during the
23 prosecution’s closing argument after the prosecution stated that
[petitioner] was charged with sexual assault in 1997. Thus, at the
precise point during the prosecution’s closing argument when the
prosecution referred to the sexual assault charges, the jury was
reminded that the prosecution’s questions did not constitute
evidence. And finally, the evidence supporting the convictions was
strong and could not have been influenced by a question that was
denied by the [petitioner]. Specifically, [petitioner] admitted that
the victim demanded to go to the police while he was driving her,
that she tried to get out of his car and ultimately jumped out of it,
and that she flagged down a car. This admitted conduct is hardly
the action of someone not held against her will. And an

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⁷ On petition for rehearing, the Court of Appeal modified its opinion to include several
26 footnotes. (See Ex. G to Answer at 1-4.) However, the court’s ultimate conclusion that the
prosecutor did not commit misconduct when he questioned petitioner about details of the spousal
abuse conviction remained unchanged. (Id.)

1 independent witness confirmed the victim's testimony that she
2 flagged down his van.

3 Together, these reasons demonstrate that the mere asking of a
4 question about digital penetration that the [petitioner] denied and
5 which question the jury was reminded was not evidence – all in the
6 context of a strong case in support of the jury's findings of guilt –
7 did not affect the verdicts. Whether or not Chapman v. California
8 (1967) 386 U.S. 18, 24 [17 L.Ed. 2d 705, 710] is the standard of
9 review here – which the parties dispute – it is certain that a
10 reasonable jury would have reached the same result, even in the
11 absence of the prosecution's inquiry whether [petitioner] had
12 digitally penetrated his former spouse.⁸

13 (Opinion at 11-12, as modified by order filed January 31, 2001 (filed as Exhibit G to the
14 Answer)).

15 Petitioner argues that the prosecutor's questions, described above, constituted
16 misconduct because the prosecutor had no intention and no ability to prove that petitioner
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18 ⁸ In his petition for rehearing, [petitioner] takes issue with this Court's reasons for
19 finding no prejudice on several different grounds. First, he correctly observes that his denial of
20 the charge of digital penetration alone does not avoid prejudice from the challenged questions.
21 However, his denial, in combination with the other factors that we cite, supports our conclusion
22 that the prosecutor's questions about digital penetration did not affect the verdicts.

23 Second, [petitioner] argues that his admission of the spousal abuse conviction did not
24 mitigate the impact of the question concerning digital penetration because “[s]exual assaults are a
25 different animal than non-sexual assaults.” But here, the spousal abuse was of a sexual nature in
26 light of [petitioner]’s admission that he tore – albeit accidentally – his former spouse’s underwear
and that the underwear was removed, albeit “accidentally.” We conclude that the questions
concerning digital penetration could not have had any impact independent of [petitioner]’s
evasive admissions concerning the circumstances surrounding his admitted spousal abuse
conviction.

27 Third, [petitioner] contends that the evidence supporting his conviction was not strong (in
28 contrast with our conclusion that it was), and argues that “[t]his was a true he-said-she-said case
29 with a victim who was not without credibility problems.” Admittedly, much of the evidence in
30 this case came from the testimony of the [petitioner] or the victim. But what [petitioner]
31 overlooks is that he himself admits to facts that are not consistent with his version of events, such
32 as the fact that the victim demanded that he take her to the police and that she ultimately had to
33 jump out of his car – facts that corroborate the victim’s story, and behavior that is otherwise
34 inexplicable in the context of the [petitioner]’s story. Further, the jury was fully able to assess
35 the credibility of the [petitioner] and the victim. The prosecutor’s questions concerning
36 [petitioner]’s digital penetration of his former spouse did not affect the jury’s verdicts of
37 kidnapping, false imprisonment, and assault of the victim in even the slightest fashion in light of
38 the admissible evidence before the jury and its credibility determination of the [petitioner]’s and
39 the victim’s testimony.

1 digitally penetrated his wife in connection with the charge of spousal abuse. He also argues that
 2 the misconduct was prejudicial because the case was close and involved a credibility contest
 3 between petitioner and a victim who was intoxicated and had reason to falsely accuse him.

4 Even assuming arguendo that the prosecutor committed misconduct when he
 5 cross-examined petitioner about details of his conduct in the spousal abuse case, the state court's
 6 opinion that petitioner did not suffer prejudice is not contrary to federal law and should not be set
 7 aside.⁹ For the reasons explained by the state appellate court, the prosecutor's conduct could not
 8 have had a "substantial and injurious effect or influence in determining the jury's verdict."
 9 Notwithstanding the victim's alleged credibility problems, in light of petitioner's testimony
 10 admitting his conviction for spousal abuse and corroborating many of the critical facts of the
 11 victim's version of events, the prosecutor's questions suggesting that petitioner may have
 12 digitally penetrated his wife in connection with his conviction for spousal abuse, a suggestion
 13 which petitioner denied, were not prejudicial. This is particularly true in light of the verdict of

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15 ⁹ The state appellate court analyzed harmless error under Chapman, which is the appropriate standard on direct review. Chapman v. California, 386 U.S. 18, 24 (1967). Prior to the passage of the AEDPA, federal habeas courts reviewed state determinations of harmless error pursuant to Brecht, with the inquiry being whether an error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). After AEDPA, it is an open question whether a federal habeas court analyzing a state court's harmless error finding should continue to apply Brecht or determine instead whether the state court's decision was "contrary to, or involved an unreasonable application of" Chapman. 28 U.S.C. § 2254(d)(1). See e.g. Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam) (Supreme Court not applying Brecht in examining the harmlessness of constitutional errors on collateral review where the state explicitly adjudicated a federal claim on Chapman harmless error grounds); Medina v. Hornung, 386 F.3d 872, 878 (9th Cir. 2004) (upholding state court's harmless error analysis under Chapman without referring to or applying Brecht); Picazo v. Alameida, 366 F.3d 971 (9th Cir. 2004) (applying Brecht while observing that the Supreme Court in Esparza neither mentioned nor overruled Brecht and its progeny). See also Saiz v. Burnett, 296 F.3d 1008, 1012-13 (10th Cir. 2002) (holding that if the state court correctly applied Chapman, federal courts do not apply Brecht unless the state court's Chapman analysis violated AEDPA); Noble v. Kelly, 246 F.3d 93, 101 n.5 (2d Cir. 2001) (noting open question where state appellate court explicitly reviewed error for harmlessness); Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000) (expressing doubt as to whether Brecht survived AEDPA at all, but declining to decide the issue); Anderson v. Cowan, 227 F.3d 893, 898 n.3 (7th Cir. 2000) (noting the issue but declining to decide it). Because this court concludes the state trial court's error in this case was harmless under both possible standards of review, the court will decline to decide which standard should govern.

1 acquittal on the sexual battery counts against petitioner. Accordingly, petitioner is not entitled to
2 relief on this claim.

3 3. Closing Argument

4 Petitioner also claims that the prosecutor's closing argument to the jury
5 "concerning [petitioner's] negative answers" to the cross-examination questions related above
6 constituted prosecutorial misconduct. (Pet. at 5.) Petitioner does not explain or elaborate on this
7 claim any further in the points and authorities attached to the petition or in the traverse.
8 Petitioner's vague and unsupported claim in this regard does not warrant habeas relief. See Jones
9 v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) (quoting James v. Borg, 24 F.3d 20, 26 (9th Cir.
10 1994)) ("[c]onclusory allegations which are not supported by a statement of specific facts do not
11 warrant habeas relief").

12 The court notes that on direct appeal, petitioner raised several claims of
13 prosecutorial misconduct during closing argument. In one of those claims, petitioner argued that
14 the prosecutor improperly commented on petitioner's responses to cross-examination questions
15 about the charge of spousal abuse. He specifically challenged the following argument:

16 "And [[petitioner] is] impeached not only with the '87 case, the '97
17 case. Got an answer for everything. Got an answer for everything
18 that happened. [¶] '97 case. Oh, yeah. Yeah, I was charged.
19 That's right, I was charged with the sexual assault in that case, too,
20 but didn't happen . . . I asked him, well, did you go in her house?
21 [¶] Did you rip her underwear off? [¶] No. No."

22 (Opinion at 16-17.) Petitioner contended that this argument

23 "[left] no doubt as to the prosecutor's message: his office after
24 careful review believed [[petitioner]] committed the sexual assault
25 in 1997 'too.' [[Petitioner]'s] denial of the allegation should be
26 discounted – he's a 'con man' who has an 'answer for everything.'
Conclusion: he committed the sexual assault in 1997 and his denial
in front of the jury should be discounted."

27 (Id. at 17.)

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1 The California Court of Appeal denied this claim on the grounds that the
2 prosecutor's comments were fair comment on evidence, supplied by petitioner himself on cross-
3 examination, that he was charged with sexual assault and that he had removed his ex-wife's
4 underwear, albeit accidentally. The court also concluded that even if the prosecutor's comments
5 could be construed as referring to the purported digital penetration of petitioner's ex-wife, they
6 were not prejudicial in light of the trial court's admonishment to the jury that "questions are not
7 evidence." (Id. at 18.)

8 Assuming arguendo that petitioner is making the same claim in this court as the
9 claim he made on direct appeal, it should be denied. In order to determine whether a prosecutor
10 engaged in misconduct during closing argument, it is necessary to examine the entire proceedings
11 and place the prosecutor's remarks in context. See United States v. Robinson, 485 U.S. 25, 33
12 (1988); Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer
13 that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury,
14 sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging
15 interpretations."). In fashioning closing arguments, prosecutors are allowed "reasonably wide
16 latitude." United States v. Birges, 723 F.2d 666, 671-72 (9th Cir. 1984). Although it is improper
17 to base closing arguments upon evidence not in the record, prosecutors are free to argue
18 "reasonable inferences from the evidence." United States v. Gray, 876 F.2d 1411, 1417 (9th Cir.
19 1989). See also Ducket v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995). Prompt and effective
20 action by the trial court may neutralize any damage by admonition to counsel or by appropriate
21 curative instructions to the jury. See, e.g. United States v. Freter, 31 F.3d 783, 787 (1994);
22 United States v. Mikka, 586 F.2d 152, 155-56 (9th Cir. 1978).

23 This court concludes that the prosecutor did not commit misconduct by virtue of
24 the challenged closing argument. As explained by the state appellate court, the prosecutor's
25 remarks were a fair comment on evidence provided by petitioner on cross-examination. Even
26 assuming arguendo that the prosecutor's remarks constituted misconduct, petitioner has failed to

1 demonstrate prejudice. In light of the strength of the government's case and the jury admonition
2 given by the trial court, the prosecutor's comments did not render petitioner's trial fundamentally
3 unfair. Accordingly, petitioner is not entitled to relief on this claim.

4 B. Ineffective Assistance of Counsel

5 Petitioner's second claim for relief is that he received constitutionally ineffective
6 assistance of counsel through numerous errors of counsel. Specifically, petitioner alleges that his
7 trial counsel: (1) failed to move for a dismissal of the kidnapping charge against petitioner on the
8 grounds of insufficient evidence; (2) failed to call several defense witnesses to the stand; (3)
9 failed to "properly investigate;" (4) did not sufficiently prepare the toxicologist for his trial
10 testimony; (5) failed to prepare for trial; (6) failed to adequately diagram the crime scene and
11 "route of travel;" (7) failed to subpoena videotapes at the AM/PM store to show that petitioner
12 arrived at the store before the victim did; (8) failed to file a timely notice of appeal; (9) failed to
13 impeach the victim with respect to her testimony that she and petitioner watched the Playboy
14 channel at petitioner's residence and that petitioner's automobile had power locks; and (10)
15 failed to "adequately rehabilitate petitioner's testimony." (Pet. at 5, 25-27, 37.) These claims
16 were rejected by the California Superior Court on petitioner's application for a writ of habeas
17 corpus in a reasoned decision dated June 9, 2000, and summarily denied by the California
18 Supreme Court by order dated June 27, 2001. This court will analyze petitioner's claims in turn
19 below after setting forth the applicable legal principles.

20 1. Legal Standards

21 In order to prevail on a claim of ineffective assistance of counsel, petitioner must
22 show two things: an unreasonable error and prejudice flowing from that error. First petitioner
23 must show that, considering all the circumstances, counsel's performance fell below an objective
24 standard of reasonableness. Strickland v. Washington, 466 U.S. 688 (1984). The court must
25 determine whether in light of all the circumstances, the identified acts or omissions were outside
26 the wide range of professional competent assistance. Id. at 690. "Review of counsel's

1 performance is highly deferential and there is a strong presumption that counsel's conduct fell
2 within the wide range of reasonable representation." United States v. Ferreira-Alameda, 815
3 F.2d 1251, 1253 (9th Cir. 1986).

4 Second, petitioner must prove prejudice. Strickland at 693. To demonstrate
5 prejudice, petitioner must show that "there is a reasonable probability that, but for counsel's
6 unprofessional errors, the result of the proceeding would have been different." Id. at 694. A
7 reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.
8 The focus of the prejudice analysis is on "whether counsel's deficient performance renders the
9 result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506
10 U.S. 364, 372 (1993).

11 2. Failure to File a Motion to Dismiss

12 Petitioner first claims that his trial counsel rendered ineffective assistance because
13 he failed to file a motion to dismiss the kidnapping charge against him on the grounds of
14 insufficient evidence. This claim lacks merit and should be denied.

15 An attorney's failure to make a meritless objection or motion does not constitute
16 ineffective assistance of counsel. Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing
17 Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985)). See also Rupe v. Wood, 93 F.3d 1434,
18 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance").
19 "To show prejudice under Strickland resulting from the failure to file a motion, a defendant must
20 show that (1) had his counsel filed the motion, it is reasonable that the trial court would have
21 granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would
22 have been an outcome more favorable to him." Wilson v. Henry, 185 F.3d 986, 990 (9th Cir.
23 1999) (citing Kimmelman, 477 U.S. at 373-74). Petitioner has failed to demonstrate that a
24 motion to suppress would have been granted as meritorious.

25 Petitioner claimed in his petition for writ of habeas corpus to the California
26 Superior Court that there was insufficient evidence to support his conviction for kidnapping. The

1 Superior Court rejected that claim on the grounds that: “(1) procedurally, it is an issue that should
2 be presented on appeal; and (2) substantively, it is refuted by extensive evidence to the contrary
3 adduced at trial.” (Answer, Ex. H at 5.) Pursuant to California law, kidnapping is “a substantial
4 movement of a person accomplished by force or fear.” People v. Cortez, 6 Cal. App. 4th 1202,
5 1209 (1992). See also California Penal Code § 207(a). There was evidence introduced at
6 petitioner’s trial, which has been summarized above, demonstrating that petitioner moved the
7 victim a substantial distance in his car by the use of force or fear, causing her to jump out of a
8 moving vehicle and summon help. In light of those facts, counsel’s decision not to file a motion
9 to dismiss was neither unreasonable nor outside the “wide range” of professional legal assistance.
10 Accordingly, petitioner is not entitled to relief on this claim.

3. Failure to Call Defense Witnesses

Petitioner next claims that his trial attorney rendered ineffective assistance because of his failure to call four defense witnesses.¹⁰ Those witnesses, and the testimony petitioner believes they could have provided, are described by petitioner as follows:

1) Karl Ortega The Petitioner's cousin. Petitioner placed a cellular call to Karl Ortega in route after meeting Ms. Santos. Karl Ortega asked both Ms. Santos and Petitioner to attend a birthday party at his home. Karl Ortega would have testified to the casual demeanor of the victim and the defendant during the ride to the house.

2) Tom and Kami (next door neighbors) These two neighbors were seated on the front porch of their home when the Petitioner and Ms. Santos arrived. They remained on the porch until Ms. Santos and the Petitioner left the house. They would have testified that they heard no screams, or other sounds of distress. Neither did they witness a struggle or any indication that the victim was being forced into the automobile.

3) Hadessah Wells: she could have refuted the prosecutor's false allegation that the May 1, 1997 § 237.5 felony spousal abuse included digital penetration. Further, Hadessah Wells enjoyed spousal privilege pursuant to Evidence Code § 970-971. The prosecutorial threats to call Hadessah Wells as an impeachment

¹⁰ Petitioner's exact claim is that his trial counsel improperly failed to call eight witnesses, but he describes only four witnesses. (See Pet. at 25-26.)

witness, during the cross examination of the Petitioner, were without foundation. The Prosecutor elicited § 273.5 felony spousal abuse information with a “good faith” promise that he would subpoena the wife. This was not done and Clarence Brown did not vigorously pursue this obvious example of prosecutorial misconduct.

(Pet. at 25-26.)

The California Superior Court rejected these claims with the following reasoning:

Petitioner has not pled a *prima facie* case for relief in support of any of these claims. He states that his cousin, Ortega, would have testified as to the casual demeanor of himself and the victim after the incident during phone conversations. But he has failed to provide a declaration from Ortega in which Ortega states that he was willing to provide such testimony at trial, if asked. Furthermore, even if he had supplied the court with a declaration, the evidence does little to exonerate him. As already noted, it was established at trial that the victim forcible [sic] exited the vehicle, ran into traffic, and stopped a van in order to escape from him. Accordingly, his attorney did not render ineffective assistance by failing to produce him as a witness.

The court should also reject his claim in regard to the alleged testimony of his neighbors, Tom and Kami. He states that they would have refuted the victim’s testimony that they struggled upon their departure from his residence. They saw nothing that would have indicated that he forced them into his vehicle. Again, petitioner has not provided the court with a declaration from them in which they state that they were willing to provide such testimony at trial, if asked. In the absence of such a declaration, the court declines to issue an order to show cause.

In regard to his attorney’s failure to produce his wife as a witness, petitioner emphasizes that the prosecution impeached him by falsely stating that he had digitally penetrated her during a previous instance of spousal abuse. She would have refuted the allegation. He has already challenged the prosecution’s impeachment of him on this basis on appeal. (AOB 13-19.) Here, he argues that his attorney should have refuted the prosecution’s contention by producing his wife as a witness at trial.

An examination of one of his in limine motions reveals that she would not have been an especially good witness for him. After the incident, she initially told the police that there was no penetration. She later told the police to the contrary, and, finally, at his trial for spousal abuse, denied it. (CT 285-288, 494.) His attorney may have therefore reasonably concluded that she may not have been an especially good witness. Indeed, he could have logically concluded

1 that her testimony would have persuaded the jury that he did
2 actually sexually assault her. There was therefore a rational,
3 tactical reason for his failure to call her. (Strickland v. United
States, supra; People v. Ledesma, supra.)

4 Answer, Ex. H at 4.)

5 The decision of the California Superior Court rejecting these claims is not
6 contrary to or an unreasonable application of Strickland and should not be set aside. Petitioner
7 has failed to demonstrate that any of the above witnesses he describes would have agreed to
8 testify at trial to the facts suggested by petitioner. See United States v. Harden, 846 F.2d 1229,
9 1231-32 (9th Cir. 1988) (no ineffective assistance because of counsel's failure to call a witness
10 where, among other things, there was no evidence in the record that the witness would testify).
11 Further, even assuming that these witnesses would have been willing to testify to the facts
12 described by petitioner, counsel's failure to call them did not result in prejudice. Testimony from
13 Ortega that petitioner and the victim had a "casual demeanor" in the car en route to his house
14 would have been irrelevant to the charge that petitioner kidnapped and assaulted the victim some
15 time after they arrived at his house. Similarly, testimony that petitioner's neighbors did not hear
16 or see anything unusual when petitioner and the victim entered and exited his house would not
17 necessarily have been inconsistent with the victim's testimony at trial and would have had no
18 bearing on whether petitioner assaulted the victim in his house or forced her to remain in his
19 vehicle after it had left his residence.

20 With regard to petitioner's former wife, petitioner has failed to show that his
21 attorney's decision not to call her as a witness was outside the wide range of reasonable
22 professional assistance. As explained by the Superior Court, this witness had changed her story
23 several times in the past with respect to the details of the spousal abuse; therefore, counsel may
24 have determined that she would be a poor witness for the defense. Further, counsel may have
25 determined, for tactical reasons, not to highlight petitioner's conviction for spousal abuse. See
26 Furman v. Wood, 190 F.3d 1002, 1007 (9th Cir. 1999) (citing Strickland, 466 U.S. at 687)

1 (“Counsel’s tactical decisions are ‘virtually unchallengeable’”). Petitioner is not entitled to relief
2 on his claim that counsel rendered ineffective assistance when he failed to call four defense
3 witnesses.

4 4. Failure to Investigate and Prepare

5 Petitioner contends that his trial counsel rendered ineffective assistance because of
6 his failure to “investigate” and “prepare for trial.” (Pet. at 26.) He states that counsel informed
7 him “there was no money to call witnesses” or “conduct a more complete investigation.” (Id.)
8 He also states that counsel told him he did “not have to put on a defense because there was
9 insufficient evidence to support the charges.” (Id.)

10 Petitioner’s vague claims in this regard are insufficient to establish prejudice. He
11 has failed to demonstrate how further investigation would have changed the outcome of this case.

12 See Villafuerte v. Stewart, 111 F.3d 616, 632 (9th Cir. 1997) (petitioner’s ineffective assistance
13 claim denied where he presented no evidence concerning what counsel would have found had he
14 investigated further, or what lengthier preparation would have accomplished). In addition,
15 contrary to petitioner’s claim, counsel did “put on a defense.” Petitioner testified on his own
16 behalf and called a toxicologist in support of his argument that the victim was intoxicated during
17 the events in question. (Reporter’s Transcript on Appeal (RT) at 424, 752.) Petitioner has failed
18 to explain how a different defense would have resulted in a better outcome. In this regard, the
19 court notes that three of the counts against petitioner were dismissed because the jury was unable
20 to reach a verdict on those counts. Petitioner has failed to show that counsel’s failure to devote
21 more time to this case rendered the result of the trial unreliable or the proceeding fundamentally
22 unfair. Accordingly, these claims should be denied.

23 5. Failure to Prepare Witness

24 Petitioner next claims that his trial counsel did not sufficiently prepare the
25 toxicologist for his trial testimony. He specifically challenges testimony “related to the effects of
26 40 ounces of a 6% alcoholic beverage on a 121 lb. woman.” (Pet. at 26.) He states that the

1 victim did not weigh as much as she claimed and that, if her weight had been verified, it would
2 have been apparent that “the effects of the alcohol she consumed would have had a greater
3 effect.” (Id.)

4 The California Superior Court rejected this claim with the following reasoning:

5 [T]he victim testified that she drank one 20-ounce wine cooler, and
6 started a second one. (RT 172.) The toxicologist testified she
7 would have had a blood alcohol level of approximately 0.8 after
drinking the first one. She would have had a level of 0.13 when
encountering the officers at the AM/PM market after she had
started the second one. (RT 755-757.) Petitioner argues that his
opinion was based upon the erroneous assumption that she
weighed 120 pounds, when, in fact, she weighed substantially less.
But he has not provided the court with any basis for this statement.
Furthermore, the jurors would have been able to determine, based
upon their observation of the victim, if her weight was less than
described.

12 (Answer, Ex. H at 3.)

13 This court also concludes that petitioner’s failure to demonstrate that the victim
14 weighed “substantially less” than 120 pounds undercuts the factual basis for this claim. Without
15 evidence that the toxicologist’s assumptions were incorrect, there is no indication that counsel’s
16 failure to “prepare” this witness prior to his testimony resulted in prejudice. Accordingly, this
17 claim should be denied.

18 6. Failure to Diagram Crime Scene and Route of Travel

19 Petitioner’s next claim is that his trial counsel rendered ineffective assistance
20 when he failed to “adequately diagram the alleged crime scene and route of travel.” (Pet. at 26.)
21 He explains that the “route of travel” described by the victim was “more consistent with the
22 Petitioner’s explanation than the victim’s” and that “this information could have been used to
23 impeach the victim’s testimony.” (Id.)

24 The California Superior Court rejected this claim with the following reasoning:

25 Petitioner asserts that that [sic] his attorney also rendered
26 ineffective assistance by failing to adequately diagram the crime
scene and the route of travel. If he had done so, he could have

1 effectively impeached her credibility. Even assuming that his
2 attorney's performance was deficient, his amorphous allegation
3 fails to establish a prima facie case of prejudice. (Strickland v.
Washington, supra, 466 U.S. at 697.)

4 (Answer, Ex. H at 5.) This court also finds that petitioner's claim in this regard is insufficient to
5 establish ineffective assistance of counsel. The claim itself is vague and confusing and petitioner
6 has failed to demonstrate that counsel's failure to diagram the crime scene rendered his trial
7 fundamentally unfair. Accordingly, this claim should be denied.

8 7. Failure to Subpoena Videotape

9 Petitioner next claims that his trial counsel rendered ineffective assistance when
10 he failed to subpoena videotapes at the AM/PM store to show that petitioner arrived at the store
11 before the victim did. The California Superior Court rejected this claim as follows:

12 As for the third one involving the AM/PM surveillance camera
13 tapes, petitioner's contention is wholly without merit. At trial, it
14 was acknowledged that he had arrived at the AM/PM market prior
15 to the victim. (RT 220-222.) Accordingly, it was not necessary for
his attorney to subpoena these tapes for this purpose. He also fails
to recognize that the urgency of his conduct may well have been
interpreted by the jury as consciousness of guilt. If so, additional
evidence would have just further impaired his defense.

16 (Answer, Ex. H at 3.)

17 The Superior Court's conclusion in this regard is not contrary to federal law and
18 should not be set aside. As described by the state court, the victim testified that petitioner
19 reached the AM/PM market before she did. Counsel's failure to obtain videotape confirming this
20 fact did not result in prejudice.

21 8. Failure to File Notice of Appeal

22 Petitioner's next claim is that his trial attorney rendered ineffective assistance
23 when he failed to file a notice of appeal. He states that his appellate counsel filed a notice of
24 appeal and that petitioner himself filed a supplemental notice of appeal "to insure the
25 preservation of rights to appeal." (Pet. at 27.)

26 ////

Even assuming arguendo that trial counsel's failure to file a notice of appeal was outside the range of reasonably competent counsel, petitioner has failed to show prejudice. There is no evidence that petitioner's appeal was impaired in any way because of inaction by trial counsel. Petitioner's appeal was timely filed and his claims were considered on the merits. Accordingly, petitioner is not entitled to relief on this claim. Cf. Roe v. Flores-Ortega, 528 U.S. 470 (2000) (ineffective assistance of counsel demonstrated where counsel failed to file a notice of appeal, causing the forfeiture of petitioner's right to appeal).

9. Failure to Impeach the Victim

Petitioner's next claim is that his trial counsel rendered ineffective assistance because he failed to impeach the victim with respect to her testimony that: (1) she and petitioner watched the Playboy channel at petitioner's residence; and (2) she was not able initially to escape from petitioner's vehicle because he activated the interior power locks. Petitioner states that he did not subscribe to the Playboy channel and that "the Lexius [sic] automobile does not have interior power locks which can restrain the person on the passenger side." (Pet. at 27.)

The California Superior Court rejected this claim with the following reasoning:

Petitioner's fourth claim is also without merit. He states that Sacramento Cable Company records of his cable services show that he did not subscribe to the Playboy Channel, or any other X-rated one. If his attorney had gotten the records, his attorney could have impeached the victim on cross-examination. Yet he has not provided this court with copies of these records as an exhibit, even though he should easily be able to obtain them. In the absence of these records, the court rejects this claim.

Lastly, petitioner asserts that his attorney did not impeach the victim by showing that his Lexus did not have power locks. Even if true, such impeachment would have had a minimal impact. She escaped from him by exiting the vehicle, running into the middle of Martin Luther King Boulevard, waving her arms, and forcing a van to stop. The driver of the van, David Sowash, told her to jump into the vehicle. (RT 215, 375.) Clearly, evidence of the lack of power locks in petitioner's Lexus would have done little to dispel the fact that she had to forcibly escape from him.

(Answer, Ex. H at 3.)

1 The Superior Court's decision rejecting this claim is a reasonable application of
2 Strickland and should not be set aside. Evidence that petitioner did not subscribe to the Playboy
3 channel, although it might have called into question the victim's credibility on that point, would
4 not have changed the outcome of this trial, especially in light of the strength of the government's
5 case against petitioner. See Eggleston v. United States, 798 F.2d 374, 376 (9th Cir.1986)
6 ("ineffective assistance claims based on a duty to investigate must be considered in light of the
7 strength of the government's case"). Further, evidence that the Lexus could not be locked on the
8 passenger side from within would have had little impact in the face of undisputed testimony that
9 the victim bolted out of a moving car to get away from petitioner. That testimony demonstrates
10 that the victim believed she was being restrained against her will and that she was afraid.
11 Whether or not petitioner tried to lock her door from within is irrelevant. For these reasons,
12 petitioner has failed to demonstrate prejudice with respect to these claims and they should be
13 denied.

14 10. Failure to Rehabilitate Petitioner's Testimony

15 Petitioner's final claim of ineffective assistance of trial counsel is directed to
16 counsel's alleged failure to effectively counter the prosecutor's cross-examination questions
17 described above in connection with petitioner's claim of prosecutorial misconduct. Petitioner
18 argues that counsel failed to "effectively rehabilitate" his testimony on cross-examination.
19 Specifically, he argues that his trial counsel "did very little to rehabilitate the damage done to
20 Petitioner's credibility during cross-examination." (Pet. at 37.)

21 Petitioner does not specify the exact portion of his testimony that counsel should
22 have "rehabilitated" and fails to explain what counsel should have done to restore petitioner's
23 credibility. Assuming arguendo that petitioner is challenging counsel's failure to effectively
24 confront the exchange described above in connection with petitioner's claim of prosecutorial
25 misconduct, he has failed to establish that counsel failed to act reasonably. The record reflects
26 that the prosecutor was permitted by the trial court to ask questions about the facts underlying

1 petitioner's prior conviction for spousal abuse and there is no evidence that petitioner's answers
2 to those questions were false. Accordingly, there is nothing that petitioner's counsel was
3 required or even able to do. To the extent that petitioner is challenging trial counsel's failure to
4 call petitioner's former wife as a witness to rebut the prosecutor's insinuation that petitioner
5 digitally penetrated his wife, that claim has been addressed above. In short, petitioner has failed
6 to demonstrate either that his counsel's performance was outside the wide range of reasonable
7 professional assistance or that petitioner suffered prejudice as a result of counsel's failure to
8 "rehabilitate" his credibility. Accordingly, this claim should be denied.

9 In accordance with the above, IT IS HEREBY RECOMMENDED that
10 petitioner's application for a writ of habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
16 shall be served and filed within ten days after service of the objections. The parties are advised
17 that failure to file objections within the specified time may waive the right to appeal the District
18 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 | DATED: June 27, 2005.

John F. Worldwide
UNITED STATES MAGISTRATE JUDGE

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